Recent Changes to CONSOB Rules on Cash Tender Offers and Exchange Offers for Debt Securities Extended into Italy

On April 5, 2011, CONSOB, the Italian Financial Regulator, approved Resolution no. 17731 (the Resolution) that contains several amendments to the rules on cash tender offers and exchange offers set forth in CONSOB regulation 11971/1999 (Regulation 11971) and completes the implementation in Italy of the EU Takeover Bids Directive (Directive 2004/25/EC) begun in 2007 with the reform of Legislative Decree 58/1998 (the Single Financial Act). This Alert discusses the new CONSOB rules which came into force on April 9, 2011. The new regulation relates to cash tender offers and exchange offers for debt securities extended into Italy and are aimed at simplifying such offers, favouring in particular the passorting procedures in case of cross-border offers and aligning the domestic rules to the international liability management practices.

Summary of the new rules

The new CONSOB rules are likely to significantly change cash tender and exchange offer practices where Italy is involved and align the Italian rules with the international liability management practices.

In particular, under the new rules and CONSOB interpretation:

- cash tender offers and exchange offers involving debt securities which are addressed exclusively to qualified investors (as defined under the Prospectus Directive) are exempt from the Italian tender and exchange offer rules, as the case may be;
- cash tender offers and exchange offers involving debt securities having a minimum denomination of at least €50,000 launched by the issuer of such securities or an affiliate are also exempt from such rules; and
- consent solicitations and amendment and waiver requests are no longer subject to the Italian tender offer rules.

Accordingly, such offers — as well as consent solicitations related to such securities — now may be freely extended into Italy without limitation under the new CONSOB rules.

In addition, in the case of retail or low denomination exchange offers of debt securities carried out in multiple EU Member states according to the Prospectus Directive rules, the offeror is entitled to disregard the specific offering document provided for by the Italian exchange offer rules and use the prospectus approved by the regulatory body of the Home Member State pursuant to the Prospectus Directive.

“Recent changes to CONSOB rules on cash tender offers and exchange offers for debt securities extended into Italy simplify such offers, favouring in particular cross-border offers and aligning the domestic rules to international liability management practices.”
Background of the reform

In Italy, unlike most EU Member States, exchange offers and cash tender offers for debt securities are governed by specific rules different from those applicable to public offers according to the Prospectus Directive (Directive EC/2003/71).

As a result, Italian tender and exchange offer rules, as confirmed by the Resolution, apply, whether or not the securities are listed in Italy, to cash tender offers and exchange offers extended into Italy to more than 99 Italian holders residing or domiciled in Italy where the total aggregate value of the offering (at a European level) is more than €2.5 million in a 12-month period. With these two conditions, the launch of exchange and cash tender offers must be disclosed to CONSOB and the public, and the offering and is subject to CONSOB approval of an offering document.

As previously mentioned, in other European countries exchange offers are subject to the Prospectus Directive rules which provide for a wide range of exemptions to the preparation of a prospectus to be cleared by the relevant regulatory body and provide for the passporting of the prospectus.

Such a material divergence of regulation and the impossibility for the offerors to benefit in Italy from the EU passport or from the exemptions provided for by the Prospectus Directive meant the exclusion of Italy and Italian investors from most of the cross-border exchange offers carried out in recent years.

To fill this competitive market and regulatory gap, in April 2009 CONSOB issued an interpretative notice recognizing that:

- Italian resident or domiciled debt securities holders have been regularly excluded by cash tender offers and exchange offers of debt securities launched in European countries despite the general principle of EC law which provides for equal treatment of security holders.
- A different set of rules apply in Italy vis-à-vis other European countries.
- Even if no offer is launched in Italy, Italian resident or domiciled debt holders may nonetheless lawfully tender their debt securities in the offer outside Italy so long as they have not been solicited.
- The Italian legislator should amend the relevant provisions on cash tender offers and exchange offers of debt securities as set fort in the Single Financial Act to make them compliant with Prospectus Directive rules.

Following its notice and given the urgency of a reform, in May 2009, CONSOB introduced a temporary procedure to ease the passporting of public exchange offer prospectuses of newly issued debt securities already cleared by the foreign competent surveillance authority in Italy according to the Prospectus Directive.

In September 2009, the Italian Parliament amended the Single Financial Act introducing a new paragraph 4-bis in Article 102 of the Single Financial Act. This new paragraph states that, with reference to exchange offers of debt securities only, the offeror can request that CONSOB confirm that the offer be governed by public securities offering rules (implementing the Prospectus Directive rules) rather than by those governing exchange offers. CONSOB, within 15 days from the date of the relevant request, must give its consent, provided that the purposes indicated under article 91 of the Single Financial Act are met (i.e. the request is not contrary to the protection of the investors and will not damage market efficiency).

The new rules on cross-border exchange offers of debt securities

The Resolution details the general procedure introduced by paragraph 4-bis of Article 102 of the Single Financial Act (as described above).
New article 35-ter of Regulation 11971 states that, in order to benefit from the exemption from the domestic exchange offers rules, the offeror shall send to CONSOB a request describing the terms and conditions of the offer, the specific exchange offers domestic rules to be exempted and the related reasons. In case of cross-border exchange retail or low denomination offers of debt instruments carried out at the same time in multiple EU Member states according to the prospectus directive rules, the offeror is entitled to disregard the specific offering document provided for by the Italian exchange offers and use the prospectus pursuant to the Prospectus Directive approved by the competent financial authority of the Home Member State. The draft of the prospectus has to be filed with CONSOB with the exemption request and a copy of the summary supplemented with at least the following information:

• The terms and conditions of acceptance of the offer in Italy
• The means of payment of the offering price and the relating tax regime
• The risk factors which the investor should consider in order to take an appropriate investment decision
• The potential conflicts of interest of the persons involved in the transaction, if any (e.g. the offeror, advisors, bookrunners)
• The essential terms of the issuance of the debt securities to be exchanged together with the exchange ratio.

The offeror is also required to file with CONSOB any updated versions of the prospectus filed abroad with the competent authority during the offering procedure. Regarding the language of the prospectus, and according to the Prospectus Directive rules, the offeror can choose between Italian or any other language commonly used in the field of international finance, typically English. If the offeror chooses a foreign language, the summary has to be translated into Italian.

**The new exemption regime applicable to exchange offers and cash tender offers.**

The Resolution conforms substantially the exemptions under the domestic tender and exchange offer rules to the exemptions available under the public offer rules implementing the Prospectus Directive and the international best practices applied to cash tender offers and exchange offers.

Under new article 35-bis, paragraph 3 of Regulation 11971, the domestic tender offer rules will not apply to cash tender and exchange offers of securities, other than those granting voting rights, exclusively addressed to qualified investors as defined under the Prospectus Directive 7.

In addition, specific exemptions are provided for exchange offers and cash tender offers for debt securities launched by the issuer of such securities 8.

Pursuant to new article 35-bis, paragraph 4 of Regulation 11971, these offers are exempted from the application of the Italian tender offer rules if, among others, one of the following conditions applies:

• The securities that the offeror intends to purchase or exchange have a minimum denomination of at least €50,000 to be calculated by adding the nominal value of each security sold or exchanged by each investor in any single offer.
• The offers relate to monetary debt securities issued by banks and having a maturity of not less than 12 months.

**Consent solicitations and amendment and waiver requests**

It is worth noting that the original draft of the Resolution included an additional exemption regarding consent solicitations and amendment and waiver requests in respect of the terms and conditions of debt securities from having to comply with CONSOB regulation on tender offers. In its comments on
the new rules, CONSOB justified the removal of the proposed exemption in the final release of the Resolution on the basis of the regulations applicable in other European countries as well as due to the fact that consent solicitations and amendment and waiver requests often require the approval of a general resolution from a majority of the holders of the securities that is binding also on dissenting or non voting holders, which contrasts with the nature of a tender offer, which provides each holder the right to determine on an individual basis whether to tender into the offer. As a result, CONSOB’s new interpretation of the Italian tender offer rules do not apply to consent solicitations and amendment and waiver requests.

Endnotes

1 The Resolution was published in Italian Official Gazette no. 81 of April 8, 2011, S.O. no. 95.

2 See Legislative Decree 146/2009 that implemented at the legislative level the Takeover Directive.


5 See CONSOB notice no. DEM/9034174 of April 16, 2009.

6 This new procedure was utilized in January 2011 with respect to the restructuring plan of General Motors Corporation (see CONSOB release no. DEM/11006582 of January 31, 2011).

7 See article 34-ter of Regulation 11971. In this respect, please note that this rule has not been aligned yet to the new definition of qualified investors as set forth in EU Directive 2010/73/EU that amended the Prospectus Directive.

8 Offers launched by the issuer of the debt securities include any offers launched by companies that control or are controlled by or under common control with the issuer. See article 35-bis, paragraph 7 a) of Regulation 11971.

9 In its comments on this threshold as compared to the higher one (€100,000) provided for by the Prospectus Directive as amended by EU Directive 2010/73/EU, CONSOB made clear that a mere reference to this new higher threshold would have the undesirable effect that debt restructuring transactions of debt securities having a par value of €50,000 could not benefit from this exemption.
Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorney with whom you normally consult. A complete list of our Client Alerts can be found on our website at www.lw.com.

If you wish to update your contact details or customise the information you receive from Latham & Watkins, please visit www.lw.com/LathamMail.aspx to subscribe to our global client mailings program.

Abu Dhabi   Houston   Paris
Barcelona   London   Riyadh*
Beijing     Los Angeles   Rome
Boston      Madrid   San Diego
Brussels    Milan   San Francisco
Chicago     Moscow   Shanghai
Doha        Munich   Silicon Valley
Dubai       New Jersey   Singapore
Frankfurt   New York   Tokyo
Hamburg     Orange County   Washington, D.C.
Hong Kong

* In association with the Law Office of Mohammed A. Al-Sheikh